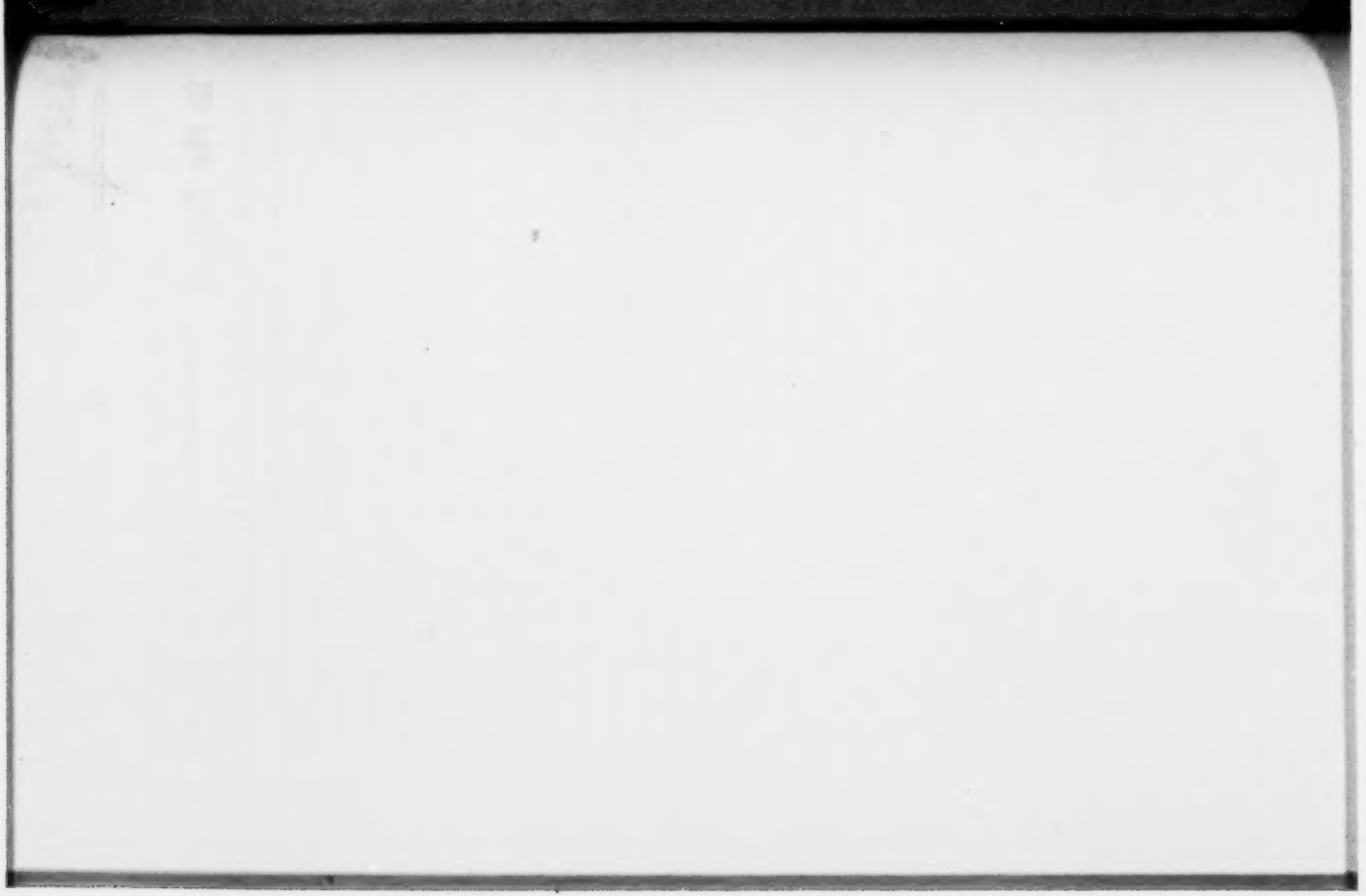

In the Supreme Court of the United States

OCTOBER TERM 1953

No. 1203

FRANK RYMARKIEWICZ,
Petitioner,

vs.

PITTSBURGH STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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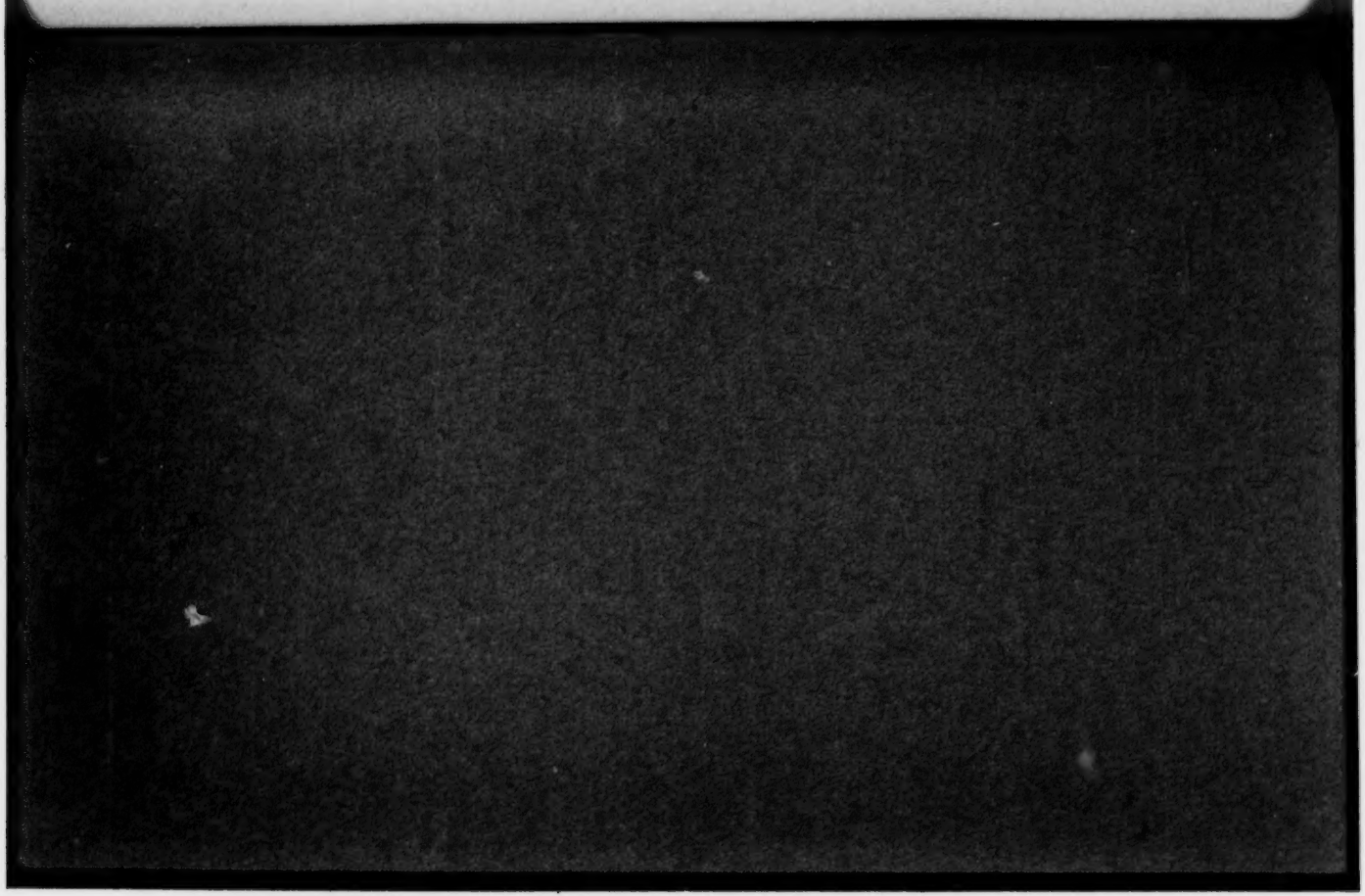

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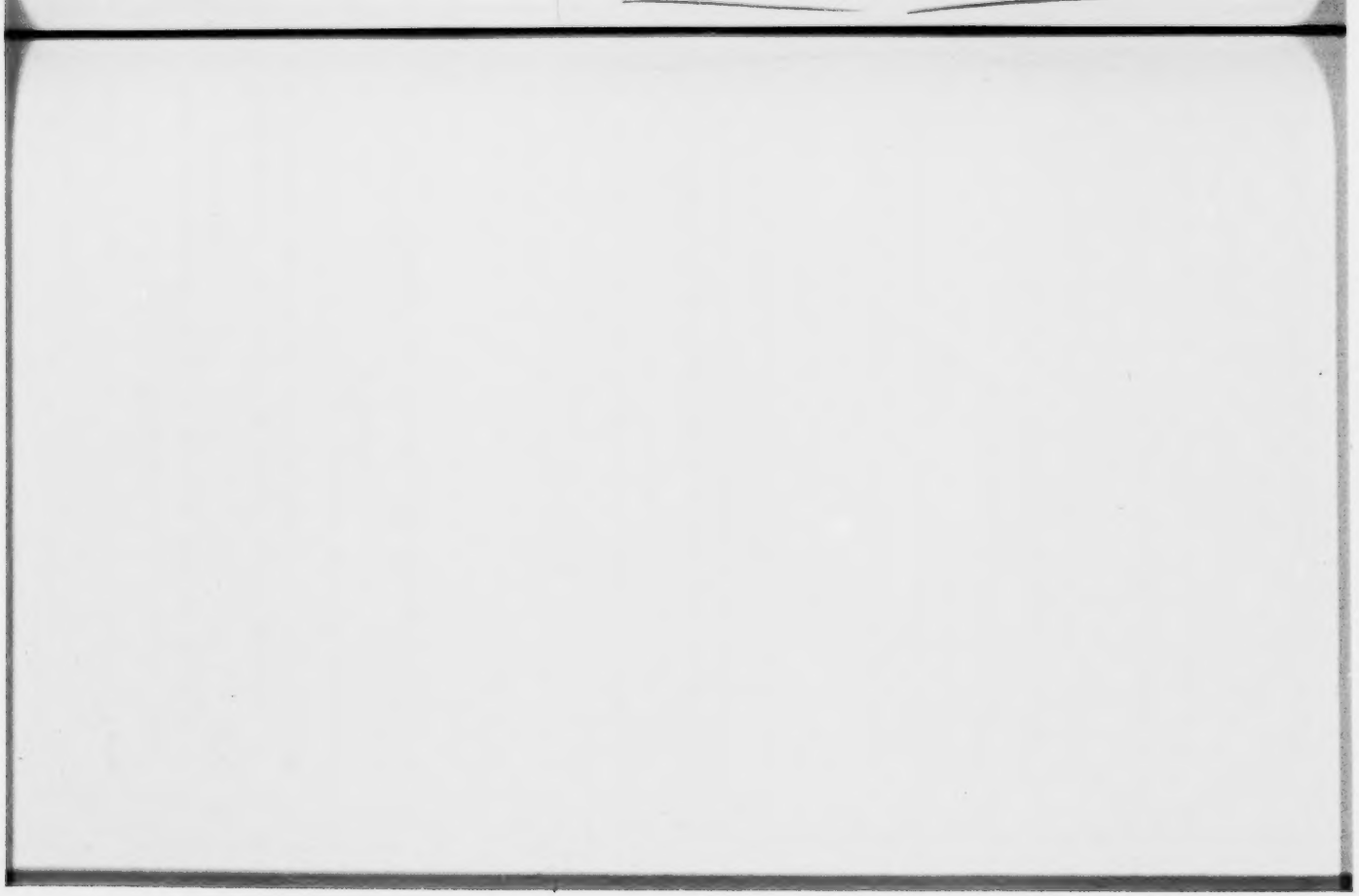

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COUNTER-STATEMENT OF THE CASE.

The Summary Statement of matters involved set forth in the petition for writ of certiorari (pp. 1, *et seq.*) does not contain a statement of all that is material to a consideration of the questions presented and respondent, therefore, deems it necessary to make the following counter-statement of the case in order to correct the inaccuracies and omissions of petitioner's statement.

Finding of Fact No. 7 made by the District Court (R. 33, 34, 35) states concisely the duties of the petitioner while in the respondent's employ and finds that at all times material to this case such duties were performed by petitioner as a seaman.

Nature of Respondent's Business.

Respondent is the owner of certain cargo vessels which are operated on the Great Lakes in interstate commerce during the navigation season. It is a matter of common knowledge, of which this Court may take judicial notice, that because of climatic conditions the active navigation

season on the Great Lakes is restricted to certain months of the year and generally commences in the spring about April 1st and continues to about December 1st, when active navigation ceases.

For a short time before the vessels commence to move in active navigation in the spring they are fitted out, and at the conclusion of active navigation in the fall the vessels are brought into port and a like period is devoted to laying up the vessels. Members of the crew report to their vessels at the beginning of the fitout and remain aboard in their respective capacities until the layup is completed in the fall. (R. 68.)

Fitout and layup duties are not separate and apart from, but as indicated are performed by the same group of seamen and such duties are incidental to their employment as seamen on Great Lakes vessels.

Petitioner's Employment.

Petitioner has been a seaman on the Great Lakes since 1926, although he did not sail every season. (R. 35, 67.) He is the holder of a continuous discharge book issued by the United States to seamen on the Great Lakes. (R. 32, 90.) During the sailing seasons of 1941, 1942 and 1943 he was employed by the defendant on its vessels as a seaman in the capacity of fireman. (R. 32.)

Articles of Employment.

When petitioner joined his vessel in the spring of the respective years he signed the Ship's Articles of Agreement provided by the respondent Steamship Company for the crews of its vessels and continued to work under Articles for successive thirty day periods until the vessel was laid up in the fall of the year. (R. 33, 73.) In the Articles the plaintiff agreed to work as a fireman on the particular vessel from the time he boarded her until the vessel was laid up at the end of the season (R. 34, 73), and in each

instance he expected to serve as a fireman until the vessel was laid up. (R. 33, 68.)

The Articles of Agreement which petitioner signed when he boarded the ship at the beginning of fitout provided as follows (R. 34):

> "(b) Each person signing these articles before the vessel goes into commission or leaves port, agrees that he will perform the duties assigned to him as a member of the crew in the capacity set opposite his name in preparing the vessel to go into commission or leave port, as well as during any voyage of said vessel during the term above mentioned. Each person being a member of the crew when the vessel goes out of commission or lays up and each person signing these Articles while the vessel is being prepared for a non-sailing or lay-up period, agrees to perform the duties assigned to him as a member of the crew in the capacity set opposite his name and upon the completion of said duties so assigned to him, the contract of employment hereunder shall cease. * * *."

Petitioner's Duties.

Petitioner stayed on the vessel which he fitted out in the spring until the layup was completed in the fall after the close of active navigation. (R. 33, 68.) As a fireman, his duties were confined to the boiler house both during the active sailing season and during the fitout and layup periods. (R. 33, 67.) From the time he boarded his vessel at the commencement of the fitout period and continuing throughout the active sailing season and until he was discharged at the end of the layup period, petitioner worked, ate and slept aboard the vessel (R. 33, 71), although when the ship was in port during the active sailing season and he was off duty, he was permitted to go ashore, and the same privilege was extended to him during the fitout and layup periods. (R. 33, 73, 74.)

As a fireman and during the entire time of his employment on any of respondent's vessels, beginning with fitout

and until the end of the layup period, petitioner performed various duties such as keeping the fires going (R. 33, 72), turbining tubes (R. 33, 62, 71), replacing grate bars (R. 33, 71), removing rust spots in the boiler room, chipping paint and painting (R. 33, 71, 72), repairing and removing gaskets (R. 33, 72), and repairing pipes. (R. 33, 74, 83.) The work performed by petitioner during the fitout and layup, as well as during the active sailing season, required a man familiar with Lake practices and with the fireman's job on Lake steamers. (R. 34, 72.) During the active sailing season, as well as during the fitout and layup periods, the petitioner was subject to the orders of the engineers of the vessel on which he was employed relating to his job as fireman, and he was obligated to carry out such orders. (R. 33, 75.)

Compensation.

Petitioner received the same rate of pay and was paid in the same manner from the time he signed Articles at the beginning of fitout until he was discharged at the end of the layup period. (R. 34, 75.) In addition, when requested by his superior to report for work in fitout he was supplied with transportation from his home to his ship, and at the conclusion of the layup period he was supplied with transportation from his ship to his home. (R. 34, 82, 83.) For the same continuous service as a fireman on respondent's several vessels petitioner was given a bonus. (R. 34, 83.)

Conclusion of Circuit Court of Appeals.

In its opinion reported at 153 F. (2d) 597 (under the caption *Weaver et al. v. Pittsburgh Steamship Company*), the Sixth Circuit Court of Appeals affirmed the judgment of the District Court. The basis of the judgment of the Appellate Court was that the petitioner was a seaman within the meaning of that term as used in Section 13(a)(3)

of the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, Section 213(a)(3)), exempting seamen from the application of the provisions of Sections 6 and 7 of the Act and, such being the fact, Sections 6 and 7 of that Act do not apply to him.

QUESTION INVOLVED.

Since the judgment of the Circuit Court of Appeals was based upon the fundamental proposition that petitioner was a seaman and, therefore, exempt from the application of the Act (Fair Labor Standards Act, Section 13(a)(3)) the questions as to whether petitioner was engaged in commerce, or, the production of goods for commerce, are not properly before this Court.

The only question to be considered by this Court is whether the individual petitioner while performing his duties in the employ of the respondent and under the circumstances found as a fact by the lower courts was employed as a seaman within the meaning of that term as used in Section 13(a) of the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, Section 213(a)(3)).

REASONS FOR DENYING PETITION.

The facts of this case do not bring it within the requirements of Supreme Court Rule 38, paragraph 5(b). The rulings of the District Court depend essentially on an appreciation of the evidence and are concurred in by the Circuit Court of Appeals. *Houston Oil Company of Texas v. Goodrich, et al.*, 245 U. S. 440. The primary question is a question of fact. *Southern Power Company v. North Carolina Public Service Company*, 263 U. S. 508. Under the circumstances presented by this record the question involved will admit of but one answer while under other circumstances the answer might be entirely different. *Triplett v. Lowell*, 297 U. S. 638. Whether a person is a member of the crew is not a question of law, but is a question

of fact. *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251. The same is true as to a seaman. *Carumbo v. Cape Cod Steamship Company*, 123 F. (2d) 991.

There is no conflict of opinion or authority between the Circuit Courts of Appeals upon the principles involved in this case, nor is the settlement of those principles of national importance or public interest. The case is important only to the immediate litigants. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U. S. 387, 393. Therefore, the petition should be denied.

ARGUMENT.

I.

THE ACTIVITIES OF PETITIONER ALONE ARE INVOLVED.

In the instant case we are concerned with the activities of one employee only, for as said in the opinion in the Circuit Court (R. 135):

> "The singular word 'employee' has been used advisedly for the reason that of the numerous plaintiffs and intervenors in this action, proof was introduced concerning the service of Frank Rymarkiewicz alone."

This contradicts the statement of petitioner on page 4 of his petition that "the rights of a large number of employees * * * are involved." In any event, the seamen on the Great Lakes devote only a very small portion of their employment period to fitout and layup work and such is a part of their duties as seamen on the Great Lakes.

The nature of the employer's business is not determinative but the application of the Act depends upon the character of the employee's activities. *Overstreet v. North Shore Corporation*, 318 U. S. 125; *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 524; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564.

II.

PETITIONER WAS A SEAMAN ON THE GREAT LAKES WITHIN THE CONTEMPLATION OF THE ACT.

In approaching a discussion of this subject it should be borne in mind that there are certain facts which are peculiar to Great Lakes navigation. It is a matter of common knowledge that ocean-going vessels operate the year around while Great Lakes vessels are idle during the winter months when ice and climatic conditions prevent them from operating. It is also a matter of common knowledge that a seaman's duties may vary dependent upon the type of vessel upon which he is employed, the use to which the vessel is being put, the waters in which the vessel is sailing, the time when and the capacity in which the seaman is employed.

Just as a seaman sailing on an ocean vessel in Arctic waters performs many duties which are not required of a seaman sailing on an ocean vessel in tropical waters, so a seaman sailing on a Great Lakes vessel performs duties which are not required of a seaman sailing on an ocean vessel.

In a consideration of this case we must bear in mind that petitioner was employed as a seaman on the Great Lakes and that as such seaman he was bound to perform his necessary duties during the fitout period in preparing the ship for its first voyage and, during the layup period at the conclusion of its last voyage, securing the ship and making it ready to withstand the rigors of winter weather.

His duties during the fitout and layup periods and the active navigating period were the same; they were performed aboard the same vessel; his rate of pay and manner of payment were the same; he was under the same discipline and received the same rate of pay and was paid in the same manner; he ate and slept aboard the vessel and was entitled to all benefits provided by statute for seamen. His service was rendered primarily as an aid in the operation

of the vessel as a means of transportation on the Great Lakes. He is a seaman within the meaning of that term as defined by the Administrator of the Wage and Hour Division in his *Interpretative Bulletin No. 11,* issued in July, 1939, and revised in July, 1943.

That fitting out and laying up the vessel were part of his duties as a seaman is evidenced by the Articles which he signed. (R. 34.)

Petitioner's service as a seaman began with the signing of the Articles. *Tucker v. Alexandroff,* 183 U. S. 424, 444. He became a member of the vessel's crew at that time. *The Ida G. Farren,* 127 F. 766. He was as much a seaman while the ship was getting ready as when it was at sea. *Lindgren v. United States,* 281 U. S. 38; *The Island City* (D. C. Mass.) 13 Fed. Cas. 172 (Case No. 7109); *Carvalho v. Fregata* (D. C. Mass.) 42 F. Supp. 404. He continued his employment as a seaman during the time the vessel was being laid up. *Jones v. Shepherd* (D. C. Miss.) 20 F. Supp. 345; *Hunt v. United States* (D. C. N. Y.) 17 F. Supp. 578 (Affirmed without opinion 91 F. (2d) 1014; cert. denied 302 U. S. 752); *Carumbo v. Cape Cod Steamship Co.,* 123 F. (2d) 991; *The Eastern Shore* (D. C. Md.) 31 F. Supp. 964.

We cannot subscribe to petitioner's theory (Brief, p. 12) that a person employed on a vessel is only a seaman at such times as the ship is under way. There are many cases holding that when a ship is temporarily idle the persons employed aboard thereof retain their status as seamen. *Lindgren v. United States,* 281 U. S. 38; *The Herdis* (D. C. Md.) 22 F. (2d) 304; *The Island City* (D. C. Mass.) 13 Fed. Cas. 172 (Case No. 7109); *The Eastern Shore* (D. C. Md.) 31 F. Supp. 964; *Jones v. Shepherd* (D. C. Miss.) 20 F. Supp. 345; *Hunt v. United States* (D. C. N. Y.) 17 F. Supp. 578 (affirmed without opinion 91 F. (2d) 1014; cert. denied 302 U. S. 752); *Carvalho v. Fregata* (D. C. Mass.) 42 F. Supp. 404.

On page 15 of petitioner's brief it is argued that "Congress is hardly likely to have intended to extend the exemption" to persons employed as was the petitioner in this case. We submit that had Congress intended to limit the term "seaman" as contended by petitioner, it would have done so specifically and in appropriate language. For instance, in 1927 when the seamen requested that they be excluded from the coverage of the Longshoremen and Harbor Workers' Act (U. S. Code, Title 33, Section 901 *et seq.*), Congress did not exempt "seamen" but limited the exemption to the "master or member of a crew of any vessel." (U. S. Code, Title 33, Section 902(3).) Not having limited the term in the Fair Labor Standards Act, we must assume that Congress used the term in its ordinary meaning as defined by the Supreme Court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50.

In the light of the decided cases and considering the identical nature of petitioner's duties during the fitout, active navigating, and layup periods, and the benefits to which petitioner was continuously entitled during such periods only because of his status as a seaman, the employment of petitioner as a seaman is determined in law and fact.

III.

THERE ARE NO QUESTIONS OF COMMERCE INVOLVED.

As previously stated, the Circuit Court of Appeals did not consider or decide the questions as to whether petitioner was engaged in commerce or in the production of goods for commerce. (R. 134.) The District Court held that he was neither engaged in commerce nor in the production of goods for commerce. (R. 35, 36.)

This Court has frequently interpreted and defined the terms "engaged in commerce" and "engaged in the production of goods for commerce." It is not necessary for

this Court to burden itself in this case by restating the principles which it has so frequently announced.

It is sufficient to say that in deciding that petitioner was not engaged in commerce the District Court considered and correctly applied the decisions of this Court. *Overstreet v. North Shore Corporation*, 318 U. S. 125; *McLeod v. Threlkeld*, 319 U. S. 491; *New York, New Haven & Hartford Railroad Co. v. Bezue*, 284 U. S. 415; *Industrial Accident Commission v. Davis*, 259 U. S. 182; *Shanks v. Delaware, Lackawanna and Western Railroad Company*, 239 U. S. 556; *Chicago & Northwestern Ry. Co. v. Bolle*, 284 U. S. 74; *Chicago & Eastern Illinois Railroad Co. v. Industrial Commission of Illinois*, 284 U. S. 296; *Armour & Co. v. Wantock*, 323 U. S. 126.

The same is true as to the District Court's decision that petitioner was not engaged in the production of goods for commerce. *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490; *Armour & Co. v. Wantock*, 323 U. S. 126; *10 East 40th Street Building, Inc. v. Callus*, 325 U. S. 578; *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517.

CONCLUSION.

It follows, therefore, that the petition for certiorari should be denied, not only because the conclusion reached by the court below is correct, but, further, there is no question of national importance or public interest involved.

Respectfully submitted,

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